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# Supreme Court of the United States

OCTOBER TERM, 1950.

## No. 291.

EMIL HANSEN, PETITIONER,

VS.

ST. JOSEPH FUEL OIL AND MANUFACTURING COMPANY, CLAUDE STEVENSON AND HARVEY HOYT, RESPONDENTS.

**RESPONDENTS' SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

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**RESPONDENTS' SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

I.

**This Case Does Not Fall Within the Class of Reviewable Cases Mentioned in Rule 38.**

Jurisdiction of this court is invoked under Title 28, U. S. C., Sections 1254 and 2101 (C) of the New Judicial Code, effective September 1, 1948, and is subject to Rule 38 of this court applying to review on writ of certiorari of decisions of circuit courts of appeal.

A. The case is a damage suit governed by Missouri law, filed and tried in Federal District Court only because of diversity of citizenship.

1. A Federal District Court jury decided for defendant.

2. The trial judge overruled motion for a new trial.

3. A three-judge court of appeals unanimously affirmed the verdict of the trial court.

4. Petitioner's motion for rehearing was overruled.

5. Certiorari if granted would result only in another appeal to a third court of a damage suit which would determine only the facts involved in this case.

B. In this case there is no decision:

1. Involving an important question of federal law which has not been or should be settled by this court.

2. Involving the decision of a federal question of any kind in conflict with applicable decisions of this court.

3. The decision is not in conflict with a decision of another court of appeal on the same matter.

4. There is no departure from the accepted and usual course of judicial proceedings and none has been sanctioned by either the district or the appellate court.

C. The only Federal question referred to by petitioner, the construction and application of Rule 51 of the Federal Rules of Civil Procedure by the appellate court is well decided by a long line of decisions; and the opinion of this appellate court

is in harmony with the established views of the Federal Courts.

D. Petitioner's cases which refer to or discuss the rule are in harmony with the decisions of this court, and in several instances rely upon cases cited by this appellate court in its opinion.

II.

**Supplemental Statement.**

Petitioner in his summary of the matter involved (petitioner's brief 2-3-4-24-25-26) offers a slightly prejudiced version of the facts not justified by the evidence nor as found by the Court of Appeals in its opinion.

Supplementing petitioner's summary of the matter, petitioner, then plaintiff, was driving on a straight, open highway where he could see for a quarter of a mile (168-169). Approaching him in the opposite direction was a truck loaded with fence posts referred to as the "Monteer truck," which in turn was followed by defendant's truck.

Defendant, following the Monteer truck down a hill, suddenly and for the first time found his brakes out of order (169) and turned over to the left side of the highway to avoid striking the rear of the Monteer truck (169-170). After so turning defendant then saw plaintiff's car approaching him about a thousand feet distant from him—blinked his lights at plaintiff as a signal (the accident occurring in broad daylight), and turning to the right and away from plaintiff as far as possible, crowded the Monteer truck over to the right until the Monteer truck which he was passing was completely off the highway to the right (170). Plaintiff's car, approaching defendant's truck, went over on an unusually wide dirt shoulder to plaintiff's right, but just as defendant's truck was crowding by the Monteer truck plaintiff suddenly turned back

to the highway immediately into defendant's truck and the collision occurred.

These are the recitation of facts in the opinion in the United States Court of Appeals (166-167-168-169-170) which are all justified by the transcript.

Plaintiff, although driving in broad daylight on an open highway with visibility for a quarter of a mile (168-169) not only did not know how long the defendant had been approaching him on his side of the highway but *never at any time even saw the Monteer truck which was admittedly also in front of him and directly approaching him* (59).

Respondents furnish this additional statement of the matter so that this court may understand why a jury found for respondents in the District Court, the District Court overruled petitioner's motion for a new trial in that court, the United States Court of Appeals found petitioner's motion for a directed verdict properly overruled; because from petitioner's statement of the matter this court might not readily understand why a jury, a trial judge and three appellate judges have all rejected petitioner's contentions.

## SUMMARY.

Petitioner argues only two points in his request for certiorari (P. Brief, pp. 26-27)—One, that this court of appeals has misconstrued Federal Rule of Procedure 51 and in so doing is at variance with other courts of appeals; and second, that this court of appeals has departed from the accepted and usual course of judicial proceedings.

With regard to his first point:

There is no important question of federal law presented which has not been settled or should be settled by

this court, and the opinion of the United States Court of Appeals is in harmony with other courts of appeal and this court.

The Court of Appeals in construing Federal Rules 46 and 51 has followed a large line of decisions both before and after the adoption of Rule 51 which are in the interests of substantial justice and which militate against "ambushing the trial court" and alleged error by a "rule of afterthought."

No new federal matter is being presented to the court and if certiorari is granted, the opinion of this court would only give a third hearing to the facts of this particular case.

None of petitioner's cases show a conflict with the opinion of the Court of Appeals in this case. Only three of them construe Rule 51 and all these decisions are in harmony with the decision in this case.

Petitioner, although contending that the Court of Appeals has so far departed from the accepted course of judicial proceedings, offers nothing in support of this point which we take to be an elaboration or a restatement in different form of his first point.

This is therefore merely another appeal of a Missouri damage suit based on state law which has already had two hearings.

## ARGUMENT.

### The Court's Charge.

The Court of Appeals in its opinion properly construed Rules 46 and 51 and its opinion in that respect is not in conflict with rulings of other courts of appeals on the same matter.

The situation concerning which petitioner complains is as follows: Petitioner submitted to the trial court ten written instructions, two of which were requests for directed verdicts, one of which was a form of verdict and the remaining seven were statements of plaintiff's view of the law. The court then delivered his general oral charge to the jury. (We shall refer later to the matter of the court's correction of his charge.)

The court's charge incorporated all of the proper statements of law sought by plaintiff in his requests and admittedly, even from petitioner's standpoint incorporated many of the statements requested by the petitioner.

For example, Instruction No. 8 was on the issue of a witness swearing falsely (149), admittedly covered by the court's charge (141). In other elements of the requested instructions the court was asked by a portion of requested Instruction No. 4 (147-148) to instruct that defendants were to be held liable for the negligence, if any, of the driver of the tractor and trailer owned or controlled by defendants, fully covered by the court in his own language (136). The court admonished the jury as to the definitions of "ordinary care" and "highest care" and "highest degree of care" more fully even than covered by plaintiff's requested Instruction No. 9.

These allusions are illustrative of the fact that although not giving the instructions of the plaintiff in the specific language and words and style requested by him, the court in his charge (134-142) covered, whether or not in the style requested by plaintiff, every proper matter referred to by plaintiff in his requested instructions.

The trial court followed the established procedure in his handling of these requests.

As was stated by the court in *Terminal R. Assn. of St. Louis* v. *Staengel*, 122 F. 2d 271, l. c. 278:

> "* * * the court should be free up to the time of charging the jury to make the charge what he thinks it should be. It is not unusual, that the arguments themselves bring out matters which affect the charge to be given. Also it is established law that the court may refuse a requested instruction as a whole and then include a portion thereof in the charge."

Petitioner does not here complain that the trial court failed to inform counsel of his proposed action upon petitioner's request prior to counsel for petitioner's argument to the jury.

Petitioner does not complain that he was precluded from arguing to the jury any matter because of the trial court's action and that later the trial court did cover the matter in his general charge, and that counsel for petitioner was not informed in advance so that he might have an opportunity to argue the matter.

**Plaintiff's Exceptions.**

The only part of Rule 51 which is applicable to the situation involved is that portion which states:

> "*No party may assign as error the giving or the failure to give an instruction unless he objects thereto*

> *before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."*

Following the court's charge, petitioner, then plaintiff, made *only one specific objection* to the court's charge. He stated:

> "I also except to the reference of the court that in the death of Mrs. Hansen the jury may not consider loss of companionship" (142).

This was the only specific objection made by petitioner to the court's charge, in keeping with the mandate of Rule 51, and petitioner does not complain before this court and did not complain before the United States Court of Appeals of the trial court's ruling on that particular ruling.

Thus even from petitioner's standpoint, the trial court in his general charge had adopted much if not all of the matters tendered to the court in petitioner's requested instructions. The charge having been given, the trial judge as the record shows, then gave the parties an opportunity to object to his charge.

We limit our discussion at this time to petitioner's main contention regarding his requested instructions, and we discuss later the matter of the correction of the court's charge.

At this time after the court's general charge, with a situation that the trial court had from either party's version covered either all or much of the matters requested by petitioner, we have the following exceptions to the court's charge as shown in the record (142-3-4-5).

Petitioner made three objections to the court's charge, as shown by the record. They are as follows:

1. "May it please your Honor on behalf of the plaintiff I take it the court will allow us exceptions to such of the charges as we have heretofore requested of your Honor insofar as they are in conflict with what your charge has been to the jury."

2. "I also except to the reference of the court that in the death of Mrs. Hansen the jury may not consider loss of companionship."

3. "The petitioner, then plaintiff, made blanket exceptions to the refusal of the court to give all ten of his requested instructions as submitted" (144-5).

What then did the petitioner point out to the court in keeping with Rule 51 which requires him to state "distinctly the matter to which he objects and the grounds of his objection." He only made one specific objection to the court's charge—that is, to the court's telling the jury they might not consider loss of companionship with regard to the death of Mrs. Hansen, plaintiff's wife. His only other objection was the perfunctory filing of all of his ten instructions and his objection which we have numbered 1, that the court should allow him exceptions to the charges *"insofar as they are in conflict with what your charge has been to the jury."*

It is therefore clear why petitioner failed to have any objection to carry to an appellate court, as has been ruled time and again by the courts of appeal of this country, both before and after the passage of Rule 51.

**Applicable Decisions Cited in Opinion.**

The cases cited by the United States Court of Appeals in its opinion in this case support the declaration of law that petitioner with his "shotgun objection" failed to comply with what is required in Federal Court procedure.

The case of *Hall* v. *Aetna Life Insurance Company,* 85 F. 2d 457, cited by this court of appeals in its opinion, is typical of decisions before and after the adoption of the rule concerning this type of situation.

(This case of *Hall* v. *Aetna, supra,* is given as a supporting opinion in *Williams* v. *Powers,* 135 F. 2d 153, cited in petitioner's brief and from which he quotes copiously.)

The Court in *Hall* v. *Aetna,* in stating its views of a similar situation, stated:

> "And the exceptions taken should point out wherein the charge is erroneous or deficient and what requested instructions or portions thereof have not, either in words or in substance, been covered by the charge as given. This is only fair to the court and to opposing counsel."

The cases cited by the Court of Appeals in its opinion are in direct and exact support of its holding that petitioner offered nothing to the court to review. These cases, set out in the court's opinion (Transcript 174-5), are: *Detroit Edison Co.* v. *Stricker et al.,* (6 Cir.) 65 F. 2d 126, 127; *Hall* v. *Aetna Life Insurance Co.,* (8 Cir.) 85 F. 2d 447, 450; Rule 51, Federal Rules of Civil Procedure; *Beaver* v. *Taylor,* 93 U. S. 46, 55; *Sugar Refining Company* v. *Nassif,* (5 Cir.) 45 F. 2d 321, 326; *O'Connor* v. *Ludlam,* (2 Cir.) 92 Fed. 50, 54; *Palmer* v. *Hoffman,* 318 U. S. 109, 119; *Krug* v. *Mutual Benefit Health & Accident Ass'n,* (8 Cir.) 120 F. 2d 296, 301.

The statement found in the *O'Connor* v. *Ludlam case, supra,* l. c. 54, is typical:

> "In the federal courts the doctrine is firmly established that exceptions should be specifically taken so that the trial judge may have an opportunity to reconsider the matter and remove the ground of ex-

ception. Where the exceptions are not specified, an appellate court is under no duty laboriously to relate each of the requested instructions to the charge as given, in order to determine that no error was committed" (citing cases).

**A Settled Question and Not One of First Impression.**

Petitioner would contend that Rule 51 is a matter of new impression and he objects to the statement in this opinion (175) that Rule 51 "is but a statement of what Federal Courts have said prior to the adoption of the rules." Yet this is what every case cited by the opinion of the court of appeals holds, both prior and subsequent to the rule.

The United States Circuit Court of Appeals of the Second Circuit, in a very recent decision, *O'Connell* v. *Naess,* 176 F. 2d 138, l. c. 140, after quoting that portion of Rule 51 at issue herein states, "Indeed such was the law as stated by Mr. Justice Brandeis in *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, at page 486, 53 S. Ct. 252, 77 L. Ed. 439, before the Federal Rules of Civil Procedure were enacted."

This court in *Palmer* v. *Hoffman,* 318 U. S. 109, 87 L. Ed. 645, stated:

> "In fairness to the trial court and to the party, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where a part of the charge was correct, he may not through a general exception obtain a new trial" (Citing cases).

This court continued:

> "That long standing rule of Federal practice is as applicable in this type of case as in others."

In *Jack* v. *Craighead Rice Milling Co.*, 167 F. 2d 96, l. c. 103, the appeals court referred to a general objection to instruction and quoted that part of Rule 51 we have quoted, *supra*, and said:

> "The failure to particularize grounds of objection below so as to give the trial court an opportunity of correcting the instruction if erroneous and to advise opposing counsel, precludes review on appeal" (Citing cases).

Adding to the great mass of authority of this well-established question we find Moore's Federal Practice under the new Federal Rules, Vol. 3, 1949 Supplement, page 147:

> "The Crux of Rule 51 in this matter is: 'No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections."

Following the statement is a mass of cases indicating uniformity and years of adherence to the spirit of this rule.

So as we demonstrate, the decisions cited by this court of appeals in its opinion before and after the adoption of the rule have both reiterated this as a long standing rule of Federal Procedure and have swept away the type of vague "shotgun" motion offered by petitioner in this case.

**Trial Court's Statement.**

Petitioner calls attention to the fact that the trial court in his memorandum passing on the motion for new trial stated as follows:

> "The questions of law submitted by plaintiff in those instructions were fully considered by the court prior to the charge to the jury."

Petitioner asserts that this statement relieved him of the necessity of making proper objections to the charge after it was delivered so as to entitle him to review on appeal.

All the trial court said was that he had given consideration to plaintiff's requests *prior to his charge.*

That is not the point at issue. The issue is: After the court had considered these instructions as he stated —after he embodied some or all of them in his charge— what did petitioner then do to call the court's attention, after the charge, that the charge had omitted or misstated any necessary elements presented in petitioner's requests?

That is the issue—What did petitioner do *after the charge* in which the trial court had considered his requests?

This is what he did: He excepted to "such of the charges as we have heretofore requested of your honor *insofar* (italics ours) as they are in conflict with what your charge has been to the jury."

This is the type of speculative "catch-all" objection consistently held by the courts to preserve nothing for review.

**Petitioner's Cases Show No Conflict with This Opinion.**

Petitioner does not cite any decision of any other court of appeals in conflict with the opinion of the court in this case.

Of all the cases cited by petitioner in his brief, only three cases refer to Rule 51 and discuss a contention as

to whether or not Rule 51 applies and whether or not the appellant complied with the rule. These cases are *Wright* v. *Farm Journal, Inc., et al.,* 158 F. 2d 976; *Sweeney* v. *United Feature Syndicate,* 129 F. 2d 904, and *Williams* v. *Powers,* 135 F. 2d 153. Respondent cannot find in any other case cited, a ruling by a Court of Appeals on the construction of Rules 51 or 46.

With regard to the three cases cited by petitioner in which this rule is discussed by a Court of Appeals, in the case of *Sweeney* v. *United Feature Syndicate, supra,* the court stated (l. c. 905-906):

> "The purpose of exceptions is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his rulings, and if necessary correct them" * * *.
>
> "Here it appears that there was full discussion of the point raised which adequately informed the court as to what plaintiff contended was the law, and the entry of a formal exception after that would have been a mere technicality."

Thus, in the Sweeney case, admittedly there was a full discussion before the trial court on the particular error charged that the trial court had not complied with the party's request and admittedly the trial court was given an opportunity to correct the error complained of.

There is no resemblance to the situation in the Sweeney case and the situation in this case. The Sweeney case adequately complied with the spirit and purpose of Rule 51. In this case there was complete lack of compliance.

In *Wright* v. *Farm Journal, supra,* the issue was whether or not in that case the court had charged that anything stated of a person concerning his occupation or profession which injures him in his occupation or profession is libelous *per se.*

That court found that the party complied with Rule 51. From the opinion, l. c. 977, the request for the instruction was made after the charge of the trial court and the opinion states:

> "The court had already told the jury that truth would be a defense and the request must be read with that limitation which no one did or could dispute."

The Court of Appeals went on to say:

> "We think the court was sufficiently warned of the point of law which, if sound, went to the very heart of plaintiff's claim. The judge certainly did not avoid the issue by remarking as a ground for his refusal: 'I do not know whether the jury knows what "libelous *per se*" means.' "

So it may be seen in the Wright case that there were specific objections to the court's charge, a discussion between counsel and the trial court as to whether or not his charge had met plaintiff's request, a situation wholly different from petitioner's "shotgun barrage at the court's charge."

In *Williams* v. *Powers, supra,* the court discussed the application and construction of Rules 51 and 46, and the opinion reflects that the issue arose in this manner:

The appellee, who was the defendant, had filed with the court a written request that it charge the jury under Section 12603 of the General Code of Ohio, and in its charge the trial court had adopted appellee's request.

At the conclusion of the court's charge and before the jury retired, in response to an inquiry by the court to counsel appellant's counsel stated: "I desire an exception, however, to Section 12603 of the General Code."

The court interrupted counsel, saying he could make any further statement in the absence of the jury. The Court of Appeals in the *Williams case* discussed Rules 46 and 51 as follows, l. c. 156:

> "The purpose of these rules is to inform the trial judge of possible errors, that he might have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient,"

citing the Sweeney case and *Hall* v. *Aetna Life Insurance Company*, 85 F. 2d 447, which is cited in the opinion complained of by petitioner.

These three cases cited by petitioner which are the only ones we find discussing and construing Rules 46 and 51, are directly consistent with the opinion in this case.

Rule 51 is in plain, unmistakable English. The three cases cited by petitioner which we have quoted show that in those cases the parties complied with what the rule required and wanted.

The facts in this case show that petitioner without any question, hair-splitting or technicalities, failed wholly to comply with the heart and spirit of the rule as well as its letter.

It is unnecessary to discuss many of the other cases cited by petitioner which do not attempt to construe Rules 46 and 51 and in which the points were not raised concerning the application of Rules 46 and 51. In many of the cases cited, the courts considered complaints of error, even though they stated the complaints were not properly raised.

In the *Lemley* v. *Christophersen* case, 150 F. 2d 291, cited by petitioner, the court stated with regard to appellant's contention, l. c. 292:

> "Appellee's brief concedes that the refusals to charge the two requests made by appellant occurred. We notice them for that reason only."

The case of *O'Donnell* v. *Elgin, Joliet & E. R. Co.*, 338 U. S. 384, 70 S. Ct. 200, 94 L. Ed. 170, cited by petitioner, involved a conflicting opinion regarding the safety appliance act and with regard to the criticism that petitioner's requests to charge were not sufficiently specific, merely stated, l. c. 176:

> "But the Court of Appeals found these requests sufficiently specific and pertinent to the issues to present the question which it decided."

In the O'Donnell case there was no discussion of compliance with Rule 51 or 46 and in this case neither the trial court nor the Court of Appeals found the requests sufficiently specific and pertinent to the issues to present the question which it decided.

**The Court's Correction of Its Charge.**

In its opinion (172) the court refers to the inadvertent transposition of the names of the parties "plaintiff" and "defendant." The opinion further (173) sets out the explicit, plain and categorical clarification which the trial court gave. The record shows that the trial court, in addition to asking if the clarification was clear to the members of the jury, in asking whether or not there was any confusion about it, added the sentence which is not quoted in the court's opinion, but appears in the transcript (151) "All right, I hope that is clear, so the record may be straight." The record then shows that the case was sub-

mitted to the jury and that petitioner's counsel sat silently by in the court room, apparently accepting the clarification as adequate and sufficient as stated by the court in its opinion (173). The case relied upon by the court in its opinion, the cases cited by respondent in its brief, such as *Keller* v. *Brooklyn Bus Corporation,* 128 F. 2d 510, and others, make it clear that the trial court did correct the confusion which, coupled with the total silence of the plaintiff and his entire failure to make any objection to the charge as corrected unmistakably upheld the court of appeals in its opinion on this issue.

As was stated in *Perley* v. *Roberts,* 138 F. 2d 518, l. c. 520:

> "The record does not indicate that she complied with Rule 51, Federal Rules of Procedure, by objecting to the charge before the jury retired, stating distinctly the matter therein to which she objected. Instead it distinctly appears that she permitted the jury to retire to consider its verdict without voicing any objection whatever to the charge as given."

Plaintiff also obtained a substantial benefit from the correction, for, as the appellate court pointed out in its opinion (173) the trial court in its correction erred substantially in favor of petitioner by telling the jury that plaintiff was liable only for "ordinary care" while the defendants were held to a duty of "the highest degree of care." See *Wininger* v. *Bennett et al.,* 104 S. W. 2d 413, in a case in some respects much like the facts in this case.

Petitioner would claim that the ruling of the court of appeals in the matter of the corrected charge in in conflict with the ruling of this court in the *O'Donnell case, supra,* and the following cases: *Baer Bros.* v. *Palmer et al.,* (10 C. A.) 158 F. 2d 278, 280, 281; *Louisville and N. R. Co.* v.

*Johnson,* (C. A. 7) 81 Fed. 679, 681; *Puget Sound Nav. Co.* v. *Nelson,* (C. A. 9) 59 F. 2d 697, 700.

There is no conflict between the opinion in this case and the cases cited by petitioner. In the Baer Brothers case the trial court made numerous errors in this charge and a later instruction of the court did not refer to these errors or make any attempt whatever to correct them. In this case the appellate court said, "It is obvious that the attempted curative instruction in no degree pointed out or corrected the errors complained of." In the Louisville & N. R. Co. case, there was no attempt by the court to correct a previous erroneous instruction. An erroneous statement was followed by a general instruction but no attempt was made by the trial court to refer to any instruction as having been incorrect with the intention to restate it or correct it.

In the *Puget Sound case* the court stated, l. c. 700:

> "But nowhere did the trial court specifically correct or repudiate the erroneous exposition of the rule as to the mandatory effect of the statute. Nowhere did he bid the jury expunge from their minds the erroneous statements and be guided only by the correct instruction."

**Clarification at the Request of the Jury.**

Petitioner makes several allusions to the request of the jury for clarification and his objection to the court's clarification in response to their request. Exactly what happened at that time is quoted by this court of appeals in its opinion (174). Following the court's clarification, petitioner made this objection:

> "The plaintiff excepts to that charge of the court for the reason that contributory negligence is not a defense in this case, and under the facts and evidence

> in evidence in this case, the case does not warrant submission of contributory negligence to the jury, and, further, the charge of the Court is too broad and not specific enough, too general. * * * It might be misleading and confusing" (152).

Petitioner's objection that contributory negligence was no element in this case was obviously an untenable one under the facts in this case and under Missouri law. The trial court was left with an objection by petitioner in this respect that this particular charge of the court was too broad, not specific enough, too general, etc.

The court of appeals very properly held in its opinion that this objection presented nothing for review by the appellate court (174) (Citing cases). Obviously this contention also presents nothing to this court as grounds for certiorari in this case.

## CONCLUSION.

Respondents therefore respectfully submit that no Federal question is presented in this case which has not been or should be settled by this court; that no Federal law is involved; that the decision is not in conflict with the decision of another court of appeals on the same matter; that there is no departure from the accepted and usual course of judicial proceedings and the effect of granting certiorari in this case would be to merely give the petitioner another appeal and another opportunity to re-argue his suit for damages.

Most appropriate to this case are the remarks of Mr. Justice Frankfurter in *LeRoy Carter, petitioner,* v. *Atlanta & St. Andrews Bay Ry. Co.,* 94 L. Ed. 183, in which was said:

> "The argument at the bar of this court and the opinions dealing with the merits leave no room for doubt that no general principle is herein involved. There is merely a difference in the application of professedly settled rules under the circumstances in this particular case. Three experienced judges of the Court of Appeals have found no error in the judgment that was rendered for the defendant."

And as the comment further stated in substance, after a district court and a court of appeals have wrestled with plaintiff's case this court is asked to have another go at it. We respectfully suggest that neither Congress nor this court intended that all damage suits should be tried and their contentions adjudicated by three courts, including this court, burdened with the high responsibilities especially entrusted to it.

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**PETITIONER'S REPLY TO RESPONDENTS' SUGGESTIONS.**

I.

**Where the Facts Invoke Rule 38 This Court Takes Jurisdiction.**

The record shows respondents have, in addition to the three lawyers in the Courts below, a new lawyer in this Court, signing as attorney to argue no conflict in the Court of Appeals, the former three lawyers now appearing of counsel only. Such is significant of the seriousness to them of Petitioner's Application for Certiorari. This new attorney several times refers to our certiorari as "merely

another appeal of a Missouri damage suit," which it was intended this Court should not have jurisdiction, citing from the *Carter case, post,* a portion of a dissenting opinion of a learned member of this Court without designating that it is from a dissenting opinion. This is a damage suit for the death of petitioner's wife and serious injuries to petitioner and a most important one, at least to him, and he has a right to a fair trial according to the "law of the land" be he ever so humble. That he did not get as the record, we think, discloses, because the lower Courts misconstrued the law, and in doing so the Court of Appeals went contrary to the holdings of other Courts of Appeals as asserted in Petitioner's Petition for Certioriari.

This Court takes jurisdiction of damage suits when the proper facts appear for the invoking of Rule 38, the most recent cases being *Carter* v. *Railroad,* 338 U. S. 430, 70 S. Ct. 226, *O'Donnell* v. *Railroad,* 338 U. S. 384, 70 S. Ct. 200, and the last case of *Affolder* v. *Railroad,* 339 U. S. 101, 70 S. Ct. 509, which was certiorari on the 8 Court of Appeals, all being reversed. It ill behooves this attorney to refer to this case as "merely another appeal of a Missouri damage suit * * * which has already had two hearings" and below the dignity of this learned Court. So did the above three cases have "two hearings" below but notwithstanding a Court of Appeals in each case on certiorari was reversed. With these three cases the "wind" is taken out of the "sails" of his point.

## II.

### The Refusal of Petitioner's Written Requests by the Trial Court Were Entitled to Consideration on the Merits by the Court of Appeals.

It is also significant that the suggestions of the attorney fails to point out that the refused written requests

of petitioner, *which the Court of Appeals refused to consider*, did not properly or correctly declare the law applicable to this case, or that the oral charge of the Court declared the law as set forth in the refused written requests. They admit by their silence the requests properly and correctly declared the law but assert the oral charge "incorporates all the proper statements of law sought by petitioner's refused requests" *but such is not so as a reading of the oral charge of the trial judge will disclose as well as how inadequate and confusing it was and never once did it declare the law as set forth in the refused requests as pointed out in our reasons for certiorari.* They grasp only on "a witness swearing falsely" issue and stop with making mention only of a degree of care as to petitioner. They do not and dare not touch upon the real issues of law in our main requests, as disclosed by our petition for certiorari, and "trim" to mislead.

**No "Shotgun" Exceptions.**

Their suggestions refer to our exceptions as "shotgun objections" made with the view of "ambushing the trial Court." Such is not true. Our written requests were given to the trial judge, and he read them and refused them. They were short, specific and to the point. He allowed us exceptions and orally charged the jury otherwise. If such exceptions were "shotgun objections" then respondents' exceptions were also "shotgun objections" for they as the record shows pursued the same course with the sanction of the trial judge. They should not complain of a course they themselves pursued.

But such were not "shotgun objections," and could not be when they specifically set forth the applicable law of the case, and being refused the noting and granting of exceptions by the trial judge, was the serving of notice

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that petitioner "does not acquiesce in the decision of the Court but will seek to procure its reversal, and that he means to save the benefit of his request or objection in some future proceeding" (Black's Law Dictionary, Third Ed., page 711, citing many cases). Certainly such could not constitute "ambushing." What more could a party do, except to repeat the substance of the requests which speak for themselves and which the judge had read and admits were fully considered? Such repetition would certainly be superfluous and a restating of something the judge already knew. *May anyone successfully assert that such a course of excepting to the trial judge's refusal of such written requests was not a calling of the trial judge's attention so as to advise the judge as to the question of law involved which has been held to be sufficient even without any exceptions under Rules 51 and 46 in the cases cited in our previous reasons for certiorari, the leading case being that written by the eminent judge Learned Hand?*

They omit to quote the first two sentences of Rule 51, pertaining to "a party filing written requests," which was the basis and authority for our written requests. Was such omission an endeavor to mislead this Court? The part omitted was new in the rule from any previous practice and specifically authorized the filing of such requests and *required the trial Court to rule on them and advise counsel of its "proposed" ruling "prior to the arguments to the jury."* Such was not at least the practice of District Courts in this circuit before the rule, and cases previous to the rule are, we urge, not in point. Rule 51, at least in this respect as to written requests authorized and started a new procedure.

**The Refused Requests and Exceptions Called the Court's Attention to the Questions of Law Involved.**

There is nothing in the rule requiring a party to "*direct the attention of the trial Court specifically to the alleged points of conflict between the Court's charge and the law as stated in appellant's requests*" as the 8th Court of Appeals held in the case at bar, which we have asserted is contrary to the holding of other Courts of Appeals in our reasons for certiorari under Rule 38 of this Court. Such seems to us to go too far and wrongfully assumes the trial judge may not be able to distinguish the elements in his oral charge from the written requests on the bench before him and which after fully considering he refuses. They mention that some of our cases do not specifically refer in the opinion to Rule 51, but all of the cases we cite were decided when Rule 51 and Rule 46 were in effect, and the Courts undoubtedly had them in mind. None of them go back to a time prior to these two rules. In addition to our exceptions to the refusal of the written requests were also, as additional exceptions, the conflict between our written requests and the oral charge of the trial judge, which by the requests showed the conflict which the trial judge was bound to know having refused the requests after fully considering them as to the applicable law of the case. Cases prior to Rules 51 and 46, such as cited by respondents of *O'Conner* v. *Ludham* and others, we urge are not in point, some of which are *Jack & Craighead* (8 Cir.) an unlike case on the point cited, but even in this case the Court did consider the refused requests, and *O'Connell* v. *Maess,* another unlike case involving the admission of evidence, and no refused requests under Rule 51, and the quotation is misleading. We stop here on this feature so as to avoid repetition of our original reasons for certiorari.

III.

**The Trial Judge's Corrections of His Oral Charge Were Inadequate and Made the Charge More Confusing to a Lay Jury.**

The Court of Appeals admitted in its opinion the oral charge of the trial judge required reversal, if not clarified. We have urged in our reasons for certiorari it was not clarified but made more confusing, and such holding of the Court of Appeals of proper clarification conflicts with the holding of other Courts of Appeals and this Court. Respondents cite the case of *Keller* v. *Brooklyn Bus Corp.*, 128 F. 2d 510, which involved much less error in the charge of the trial Court, and in that case, the able dissenting opinion of, His Honor, Judge Frank, is illuminating as to a jury trial before a jury of laymen. The quotation of respondents from *Perley* v. *Roberts* involved no refused requests as in the case at bar, and the jury were "permitted to retire to consider its verdict without voicing any objection whatever to the charge as given," and notwithstanding this the Court of Appeals did examine the charge and held the applicable law was accurately stated. We wonder why respondents quoted from this case such a misleading excerpt without giving the facts of the case and then finally urges as an answer that petitioner "secured substantial benefit from the correction because the trial Court erred by telling the jury that plaintiff was liable only for 'ordinary care,' while defendant was held to a duty of the highest degree of care."

The error of the oral charge was more than one of degree of care, and the correction meant nothing in this respect to the jury. Such shows how pressed respondents are in endeavoring to find something in the way of justification to sustain the alleged correction and charge, and is on a par with the unreal testimony of the truck driver that petitioner's automobile was 1,000 feet away when he turned out to pass the post truck ahead with his runaway transport, while petitioner testified that immediately after turning the transport into his lane of traffic the collision occurred. *However, such was at least a jury question and did not affect the error in refusing petitioner's written requests and the oral charge and alleged corrections. Petitioner was entitled to a submission on his theory supported by his evidence.* Such is also on a par with respondents' argument that "after a District Court and a Court of Appeals have wrestled with plaintiff's case this Court is asked to have another go at it," and "that neither Congress nor this Court intended that all damage suits should be tried and their contentions adjudicated by three Courts, including this Court." Such slighting remarks about a damage suit involving the death of a wife and serious injuries to petitioner should have no place in this case, and such argument is far afield from our grounds for certiorari under Rule 38 of this Court, and is characteristic of respondents' suggestions. This humble petitioner is spending his hard earned money which is no small sum in invoking Rule 38 of this Court, which was made by this Court for very advisable reasons, and so long as it is

the law, petitioner is entitled to his rights thereunder, and we believe will receive from this high Court full consideration on the merits of his Application for certiorari, and that this Court will not be influenced by the unjustifiable statement of the attorney for respondents, that this is "merely another appeal of a Missouri damage suit."

Respectfully submitted,

CHARLES M. MILLER,
1412 Commerce Building,
Kansas City, Missouri,
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Dated October 16, 1950.